# RECENT CASES.

BANKRUPTCY — DEBTS NOT DISCHARGED — JUDGMENT FOR ALIENATION OF AFFECTIONS. — *Held*, that alienation of the affections of a husband is a "wilful and malicious injury to the person" within the meaning of § 17 of the Bankruptcy Act of 1898, and therefore that proceedings under the act do not discharge a judgment obtained in an action for such alienation of the affections. *Leicester* v. *Hoadley*, 71 Pac. Rep. 318 (Kan.). For a discussion of a similar decision concerning a judgment for libel, see 16 HARV. L. REV. 62.

BANKRUPTCY — EFFECT OF NATIONAL ACT UPON STATE LAWS. — The defendant to a petition in insolvency filed under a state law was "a person chiefly engaged in farming or tillage of the soil." The national bankruptcy act of 1898 provides in § 4 *b* that such persons shall not be adjudged involuntary bankrupts. *Held*, that the defendant, being thus exempted from the scope of the national act, is still subject to the state insolvency law. *Old Town Bank* v. *McCormick et al.*, 53 Atl. Rep. 934 (Md.). For a discussion of the principle involved, see 16 HARV. L. REV. 301.

BANKRUPTCY — EXEMPTIONS — STATE LAWS. — Pennsylvania state decisions hold that a seat on the Philadelphia Stock Exchange is not property subject to execution. A Pennsylvania bankrupt claimed that under these decisions, by § 6 of the Bankruptcy Act allowing the exemptions prescribed by state laws, his seat was exempt. *Held*, that the seat was not exempt, the federal courts not being bound by state decisions which are mere declarations of general law defining property. *Page* v. *Edmunds*, 23 Sup. Ct. Rep. 200.

This case seems to be the first raising the question of what are state laws prescribing exemptions. The language of the court would seem to indicate that federal courts are not bound by state decisions as to exemptions when no statute is interpreted, but may, in accordance with the doctrine of *Swift* v. *Tyson*, follow their own views as to the law of the state. This doctrine, however, does not seem essential to the decision of the principal case; for since the decisions in question do not admit that the seat is *prima facie* subject to the claims of creditors and then excuse it from such liability, but merely deny that it is such property as to be subject to levy, they are not truly decisions prescribing exemptions. Thus the state decisions, even if considered as representing the state law, would be correctly held not binding under the Bankruptcy Act. By federal authorities the seat would clearly pass. *Sparhawk* v. *Yerkes*, 142 U. S. 1; *Re Page*, 107 Fed. Rep. 89.

BILLS AND NOTES — CHECKS — HONOR OF CHECK AFTER DEATH OF DRAWER. — The plaintiff's testator made a gift of his check to his son to be collected after his death. The drawee bank, knowing of the decease of the drawer, honored the check. *Held*, that the bank must pay the amount of the check to the personal representatives of the drawer. *Pullen* v. *Placer County Bank*, 71 Pac. Rep 83 (Cal.).

It is usually assumed by the text-writers, though there is no decision on the point, that a check, even when given for value, cannot be collected after the drawee has knowledge of the drawer's death. BYLES ON BILLS, 3d Am. ed. 17; *contra*, MORSE, BANKS AND BANKING, 4th ed. § 400. So also a check given *causa mortis* cannot be collected after death. *Tate* v. *Gilbert*, 2 Ves. Jr. 117. The decision in the principal case would seem a logical conclusion, but no exact authority has been found. On the other hand, however, a check is a "bill of exchange." NEG. INST. LAW (Eng) § 73; (Am). § 185. In the hands of an indorsee for value or of a *bona fide* creditor a bill may be accepted by the drawee, even though he knows of the drawer's death. *Cutts* v. *Perkins*, 12 Mass. 206; DANIELS, NEG. INST. §§ 491, 498 a. The same rule might well be applied even though the payee or holder of the paper is a volunteer. The law of gifts is, however, *contra*. If the subject of the gift is money, the gift is incomplete at death; if it is an order on the drawee, revocable in its nature, the death of the drawer might reasonably be held to operate as a revocation. See *contra*, 14 HARV. L. REV. 588.

BILLS AND NOTES — STATUTE OF LIMITATIONS — DEMAND NOTE. — The defendant made his promissory note dated February 16, 1893, payable "on demand after date at 1 Broadway." On February 16, 1899, the plaintiff as assignee commenced his action. The New York statute of limitations is six years. *Held*, that the statute is no bar to the action. *Hardon* v. *Dixon*, 77 N. Y. App. Div. 241.

The court rests its decision on two grounds: first, that the note did not mature until the day after date; and second, that if it did, the maker was not in default until the following day. As to the first point, the court seems to give the language of the note its reasonable meaning, but the little authority found is *contra*. *Fenno* v. *Gay*, 146 Mass. 118. As to the second point, ordinarily the maker is not in default until the day after maturity. *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759. Many courts, however, hold that failure to pay on presentment on the day of maturity puts the maker in immediate default. *Veazie Bank* v. *Winn*, 40 Me. 62; *contra*, *Kennedy* v. *Thomas*, *supra*. The principal case might seem to fall within this latter holding, although no presentment appears, for generally no presentment for payment is necessary before bringing action on a demand note. *Norton* v. *Ellam*, 2 M. & W. 461; *Jillson* v. *Hill*, 4 Gray (Mass.) 316. But this is held not to apply where, as in the principal case, payment is to be made at a particular place. *Sanderson* v. *Bowes*, 14 East, 500. Therefore it would seem that, in the absence of a demand to put the defendant in default on the day of maturity, the decision is sound on the second point.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — APPEARANCE OF PARTIES. — X, a citizen of Massachusetts and domiciled in Boston, went to South Dakota and resided there the number of months necessary to acquire domicile according to the South Dakota law. He then brought suit for divorce. His wife entered an appearance, and the divorce was granted. X at once returned to Massachusetts, and thereafter married again. After the death of X, both the first wife and the second wife asked to be appointed administratrix. *Held*, that the divorce granted in South Dakota is void, for neither party being domiciled there, the courts had no jurisdiction, and could not obtain it by the appearance of the parties. *Andrews* v. *Andrews*, 23 Sup. Ct. Rep. 237.

It is a general rule of the common law that the court of the domicile alone can grant a valid divorce. *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517. It has been held by the United States Supreme Court that the requirement of domicile is not satisfied by residence in a state for the length of time prescribed by the state for the acquirement of domicile; but that there must be such domicile as is recognized by all nations, *i. e.* residence *animo manendi*. *Bell* v. *Bell*, 181 U. S. 175. But it is sufficient if one of the spouses is *bona fide* domiciled in the state granting the decree. *Atherton* v. *Atherton*, 181 U. S. 155. The question of the principal case, though raised, has not been decided before. See *Streitwolf* v. *Streitwolf*, 181 U. S. 179. The decision seems correct. Marriage is something more than a contract; it is a *status*. Jurisdiction for divorce, therefore, is not a personal jurisdiction but a jurisdiction *quasi in rem*. See 15 HARV. L. REV. 66. If a state has not jurisdiction over the *res*, the marriage, jurisdiction over the persons cannot cure the defect.

CONSTITUTIONAL LAW — FREEDOM OF CONTRACT — REGULATION AS TO WAGES. — An Indiana statute prohibits the assignment of future wages by employees, and declares invalid any agreement whereby an employer is relieved from weekly payment of full wages to an employee. Acts 1899, p. 193, § 4. *Held*, that the statute is valid under the state and federal constitutions. *International Text-Book Co.* v. *Weissinger et al.*, 65 N. E. Rep. 521 (Ind., Sup. Ct.).

It is now well settled that the constitution guarantees a right to freedom of contract. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. But this right is subject to regulation by the legislature in the exercise of the so-called police power. *Holden* v. *Hardy*, 169 U. S. 366, 391. The constitution is infringed only when the limitations on the legislative power, such as are indicated in the Fourteenth Amendment by requiring due process of law, are exceeded. But due process of law admittedly requires nothing more than a proper conformity with fixed principles of justice. See *Tyler* v. *Judges*, 175 Mass. 71; *Hurtado* v. *California*, 110 U. S. 516, 532. It cannot be said that there is anything arbitrary or unjust in the Indiana statute in view of the conceivable prejudice to the community resulting from the improvident contracts which it forbids. The decision, in assuming a liberal attitude towards the judgment of the legislature, is in contrast to the prevailing tendency of the state courts, but accords with the better view of the federal rulings. See *State* v. *Loomis*, 115 Mo. 307; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13.

CONSTITUTIONAL LAW — FREEDOM OF CONTRACT — LEGISLATIVE CONTROL OF MUNICIPAL CONTRACTS. — A statute provides that all laborers employed upon public

works of the state or any political subdivision thereof shall be employed for only eight hours per day. 94 Ohio Laws, 357 (1900). *Held*, that the statute is unconstitutional as interfering with the right of municipal corporations to freedom of contract. *City of Cleveland* v. *Clements Bros. Construction Co.*, 65 N. E. Rep. 885 (Ohio).

This decision is an illustration of the unfortunate inclination of the state courts to limit narrowly the regulation of contracts by the legislatures. (See preceding discussion.) But even though it is improper for the legislature to regulate thus the terms of contracts made by individuals, some courts hold that municipal corporations, as mere agents of the state, are subject to its direction as to the manner in which they shall contract. See *Re Dalton*, 61 Kan. 257. There are statements that they are subject to absolute control. *Mayor of Frederick* v. *Groshon*, 30 Md. 437. But the better considered decisions usually recognize that the nature of municipalities is twofold. *People* v. *Coler*, 166 N. Y. 1; *Atkins* v. *Town of Randolph*, 31 Vt. 226. Although subject to control in so far as they exercise delegated governmental powers, they fulfil a further function as the representatives of their inhabitants, in which capacity they enjoy private rights, exempt from state interference. Consequently statutes regulating municipal contracts must stand on the same basis as those of general application.

CONSTITUTIONAL LAW — POLICE POWER — MUNICIPAL REGULATION OF STREET RAILWAYS. — *Held*, that a city ordinance requiring existing street railway companies to pave and keep in repair the space between their rails and tracks, and one foot on each side, is not a valid exercise of the police power. *Fielders* v. *North Jersey St. Ry. Co.*, 53 Atl. Rep. 404 (N. J., C. A.).

*Held*, that a city ordinance requiring existing street railway companies to clean the street between their rails is within the police power. *City of Chicago* v. *Chicago Union Traction Co.*, 65 N. E. Rep. 243 (Ill., Sup. Ct.). See NOTES, p. 436.

CONSTITUTIONAL LAW — TAXATION — GOODS IN TRANSIT. — A Michigan statute provided that forest produce which on the assessment day was in transit to a point without the state, should be assessed "at the place in this state nearest to the last boom" through which it was to pass. The plaintiff had floated logs down a Michigan river to a point where they were to lie through the winter, awaiting shipment in the spring to a destination without the state. While lying at this point, they were assessed by the village nearest the last boom. At the time they had not yet come within the limits of that village. Suit was brought to restrain collection of the tax. *Held*, that it is competent for the legislature to prescribe this mode of assessment and the tax does not infringe the commerce clause of the Federal Constitution. *Diamond Match Co.* v. *Village of Ontonagon*, 23 Sup. Ct. Rep. 266. See NOTES, p. 440.

CONSTITUTIONAL LAW — TAXATION — STATE TAX ON FOREIGN HELD STOCK. — The statutes of Maryland provide that corporations shall be taxed by taking the value of their stock, deducting the value of real estate taxed independently, and taxing the sum remaining to the stockholders. Code, Art. 81, § 141. This tax is to be collected from the corporation. The plaintiff, a non-resident stockholder, sought to enjoin the collection of the tax. *Held*, that the tax is constitutional. *Corry* v. *Mayor of Baltimore*, 53 Atl. Rep. 942 (Md.).

The *situs* of choses in action by the better view, is at the domicile of the creditor, and there only they can be taxed. See 15 HARV. L. REV. 680. Thus a state tax upon bonds owned by non-residents was held unconstitutional. *State Tax on Foreign Held Bonds*, 15 Wall. (U. S. Sup. Ct.) 300. This rule is not in fact broken by the tax in the principal case. The tax upon the stock is merely one method of estimating and reaching the whole property of the corporation, and despite its form it is really not a tax upon the choses in action held by the stockholders. See *Town of St. Albans* v. *National Car Co.*, 57 Vt. 68. If the property of the corporation had already been taxed at its full value, so that the tax upon the stock as such, fell upon the foreign stock-holders, it would seem inconsistent with the rule above stated. Such a tax, nevertheless, has been sustained. *Street Ry. Co.* v. *Morrow*, 87 Pa. St. 406. The tax in the principal case, however, although perhaps awkwardly worded, seems clearly unobjectionable. The decision is supported by considerable authority. *Tappan* v. *Merchant's Nat'l Bank*, 19 Wall. (U. S. Sup. Ct.) 490; *Faxton* v. *McCosh*, 12 Ia. 527.

CORPORATIONS — STOCKHOLDER'S RIGHT TO PROTECT CORPORATE INTERESTS — SUIT BY ASSIGNEE OF ACQUIESCING STOCKHOLDER. — A director in a corporation had negligently permitted mismanagement of its affairs. The plaintiff, an innocent assignee of his stock, sued the wrongdoers, making the corporation a party. *Held*, that the plaintiff is not barred by the acquiescence of her assignor. *Warren* v. *Robison*, 70 Pac. Rep. 989 (Utah).

A stockholder who has not acquiesced in misconduct towards the corporation may, if the directors refuse to act, proceed in equity for redress. *Farmers' Loan & Trust Co.* v. *N. Y. & Northern R. R. Co.*, 150 N. Y. 410. On the other hand a stockholder who has acquiesced is barred from such relief. *Burt* v. *British Association*, 4 De G. & J. 158. See 1 MOR. CORP. 2nd ed. § 262. That the bar is merely personal, however, and does not attach to the shares of such stockholder, seems to be indicated from the rule allowing him to share *pro rata* in sums recovered for the corporation, if a going concern, through the action of the other stockholders. See *Brown* v. *De Young*, 167 Ill. 549, 556; 1 MOR. CORP. 2nd ed. § 262. Moreover, this *prima facie* right of a stockholder to protect corporate interests is not barred, in the case of an assignee of a non-acquiescing stockholder, though the assignee took with knowledge of the wrongs or even with the purpose of redressing them. *Ramsey* v. *Gould*, 57 Barb. (N. Y.) 398; *Seaton* v. *Grant*, L. R. 2 Ch. App. 459. In the case, then, of the innocent assignee of an acquiescing stockholder, no consideration of public policy would seem to require that his right should be barred. The principal case reaches the desirable result that all shares in a going concern confer equal *prima facie* rights, which can be cut down only by a personal bar against the holder of the shares. *Parsons* v. *Joseph*, 92 Ala. 403.

CRIMINAL LAW — ATTEMPT TO COMMIT MURDER. — The defendant shot through a window at a bed upon which he supposed the prosecutor to be lying. In fact, the latter was in a different part of the house. *Held*, that defendant was guilty of an attempt to murder. *State* v. *Mitchell*, 71 S. W. Rep. 175 (Mo.). See NOTES, p. 437.

CRIMINAL LAW — HIGH TREASON — NATURALIZATION IN ENEMY'S COUNTRY. — A British subject was indicted for treason in adhering to the King's enemies. He pleaded in defense that the acts complained of were committed after he had become a naturalized citizen of the South African Republic. *Held*, that naturalization during war is no defense. *The King* v. *Lynch*, 19 T. L. R. 163 (Eng., K. B. Div.).

There would seem to be no doubt that in the absence of treaty, a sovereign may punish a subject who returns within his jurisdiction after naturalization in another state, for the state granting naturalization has no power to absolve him from his obligations. *Tousig's Case*, LAWRENCE'S WHEATON, 929. Nor will the commission of a foreign prince be a bar to a prosecution for high treason. *Macdonald's Case*, COCKBURN, NATIONALITY, 64, *note*. It was argued in the principal case that, though this was true while England maintained the doctrine of perpetual allegiance, it was no longer law, since by sec. 6 of the Naturalization Act of 1870, a British subject who becomes naturalized in a foreign state ceases to be a British subject, and is regarded as an alien. It would seem to be obvious that this defense, as applied to the principal case, is unsound. Naturalization is illegal, as are all other contracts made with the enemy in time of war. *Cf. The Hoop*, 1 Rob. 196. Even aside from this technical ground, it would seem that being naturalized by a hostile nation in war time is in itself an act of treason, for it furnishes the enemy with another subject. Any other decision would encourage treason.

CRIMINAL LAW — LARCENY — WILD ANIMALS. — The defendant was indicted for the larceny of fish taken from a pound net in Lake Erie. The fish had entered the net by a funnel-shaped opening which was never closed. Storms frequently so disturb the nets that fish escape. *Held*, that the fish were sufficiently reduced to possession to be the subject of larceny. *State* v. *Shaw*, 65 N. E. Rep. 875 (Ohio).

Wild animals are not the subject of property until brought within the actual possession, custody, or control of the one claiming ownership. *Buster* v. *Newkirk*, 20 Johns. (N. Y.) 75. Few cases illustrate what is sufficient reduction to possession. See *Young* v. *Hichens*, 6 Q. B. 606. The principal case seems clearly right in saying that it is enough if escape is practically impossible, though not absolutely so. A test requiring absolute impossibility of escape would be impractical. The question is essentially one of degree to be determined on the facts of each case. See *Pierson* v. *Post*, 3 Cai. (N.Y.) 175. In the principal case the chance that any specific fish would escape was very slight and was properly disregarded. 2 BISH. CR. L. § 775 (7th ed.); 2 RUSS. CR. 247.

CRIMINAL LAW — SENTENCES — DISCHARGE BY IMPRISONMENT UNDER DIFFERENT SENTENCE. — The petitioner had been sentenced by a federal court to five years' imprisonment in a penitentiary in Kansas. The marshal of the court, instead of conveying the prisoner there, surrendered him to the marshal of another district, where he was tried for another offence, convicted, and sentenced for life. He was imprisoned in the Ohio State penitentiary. Five years later he was pardoned for this second

offence, and was then taken back to serve the first sentence. He sued out a writ of *habeas corpus*. *Held*, that he had served this sentence by his term of imprisonment in Ohio. *In re Jennings*, 118 Fed. Rep. 479 (Circ. Ct., E. D. Mo.).

The court's argument is that the sentence was to commence at once; that the marshal, being only a ministerial officer, had no authority to postpone its execution, and that consequently it must have run out during the imprisonment in Ohio. There are, however, forcible arguments for the contrary view. A prisoner while serving his sentence may be tried, convicted, and sentenced for a separate offence. *State* v. *Connell*, 49 Mo. 282. And if sentenced to a term of imprisonment, though in the same jurisdiction, this term and that which he was formerly serving will not run concurrently but successively. *Ex parte Brunding*, 47 Mo. 255. Although a sentence thus imposed during the term of imprisonment seems ordinarily to be for some crime committed by him while in confinement or during an escape, there seems no reason that the time of the commission of the crime should make a difference. There is also the difficulty that here it was sought to impose the first sentence after the execution of the second. But it is submitted that the inversion does not injure the prisoner in such manner as to entitle him to be subsequently excused from serving his former sentence. A prisoner is not entitled to be discharged if the imprisonment which he has suffered has not in fact been in execution of his sentence. *Stokes* v. *Warden*, 60 N. Y. 342. Of the cases found, the one most nearly in point accords with this latter view. See *Sartain* v. *State*, 10 Tex. Cr. App. 651.

EQUITY — INJUNCTION — PATENT PUT TO ILLEGAL USE. — The plaintiff sought to enjoin the defendant from infringement of his patent on detectors of bogus coins. The defendants established that the plaintiff used these detectors exclusively to guard gambling-machines. *Held*, that plaintiff is entitled to an injunction. *Fuller* v. *Berger*, 35 Chic. Leg. News, 221 (C. C. A., Seventh Circ.). See NOTES, p. 444.

EQUITY — RESCISSION OF CONTRACT — MISTAKE OF FACT. — The plaintiff, the beneficiary under a life insurance policy, agreed to assign his interest to the defendant. Both parties were ignorant of the fact that the insured was already dead. The defendant learned of the death before the assignment, but concealed his knowledge. *Held*, that the assignment may be set aside. *Scott* v. *Coulson*, 19 T. L. R. 162 (Eng., Ch. D.).

The fact that one party learned of the death of the insured before the completion of the contract is immaterial, since equity will rescind a contract, though the mistake is not mutual. *Diman* v. *Prov., etc., Ry. Co.*, 5 R. I. 130. Nor is there any difference between an executory and an executed contract, provided the parties can be put in *statu quo*. *Paine* v. *Upton*, 87 N. Y. 327. But mere lack of knowledge of extrinsic facts which only make the thing sold more or less valuable is no ground for equity to interfere in any case. *Laidlaw* v. *Organ*, 2 Wheat. (U. S. Sup. Ct.) 178. On the other hand, the destruction of the thing to be sold is sufficient ground, as in the case of a contract to sell a remainder in ignorance of the fact that the tenant in tail had barred the estate. *Hitchcock* v. *Giddings*, 4 Price, 135. And even a substantial difference between the real and the intended subject matter of the contract is enough, as in the sale of an estate which both parties believed to be a freehold when in fact it was a copyhold. *Hart* v. *Swaine*, 7 Ch. Div. 42. It seems that the principal case was rightly put in the latter class, since an absolute contract right is a substantially different thing from a contingent one. *Allen* v. *Hammond*, 11 Peters (U. S. Sup. Ct.) 63.

EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO DEVISE LANDS FOR PERSONAL SERVICES. — The plaintiff came to live with, and work for his uncle, who contracted orally to devise his lands to the plaintiff in return for his services. After seventeen years the uncle died without making a will, and without any rights of third parties intervening. *Held*, that the plaintiff was equitably entitled to the estate. *McCabe* v. *Healy*, 70 Pac. Rep. 1008 (Cal.). For a discussion of the principle involved, see 14 HARV. L. REV. 64.

EVIDENCE — BURDEN OF PROOF — FIRE FROM NEGLIGENCE OF RAILROAD. — It was shown by a preponderance of evidence that a fire was caused by sparks from one of the defendant's engines. The lower court charged that the burden was on the defendant to show that the escape of the sparks was not due to negligence. *Held*, that the charge is erroneous, since the defendant has not the burden of proof on all the facts, but merely the duty of bringing forward evidence to rebut the presumption of negligence. *Galveston, etc., Ry. Co.* v. *Chittim*, 71 S. W. Rep. 294 (Tex., Civ. App.).

This decision limits the rule laid down in a previous Texas case. For a discussion of the latter case, see 15 HARV. L. REV. 74.

EVIDENCE — PROOF OF FOREIGN LAW — DECISIONS OF INFERIOR COURTS IN FOREIGN JURISDICTION. — *Held*, that the construction of the New York recording act by inferior courts of New York will not be accepted in Pennsylvania as representing the New York law. *Schmaltz* v. *York Mfg. Co.*, 53 Atl. Rep. (Pa.) 522.

The interpretation placed upon statutes by the highest court of another state is ordinarily taken as conclusive evidence of the law of that state. *Secombe* v. *R. R. Co.*, 23 Wall (U. S. Sup. Ct.) 108; *Van Matre* v. *Sankey*, 148 Ill. 536. The principal case, however, refuses to assign similar weight to the decisions of inferior courts and rejects their interpretation on the ground that it seems incorrect and undesirable and is contrary to the decision of the supreme court of New Jersey upon a similar statute. See *Knowles' Loom Works* v. *Vacher*, 57 N. J. Law, 490. It may be admitted that the decision of a lower court is merely evidence of foreign law. *Gilchrist* v. *W. Va. Oil Co.*, 21 W. Va. 115. Nevertheless it would seem that unless it appears inconsistent with other decisions in the jurisdiction, or is clearly unreasonable, it should be accepted as representing the law. Decisions in New Jersey would seem valueless in the determination of New York law. Moreover, the refusal to follow the decisions of New York inferior courts necessarily introduces an element of uncertainty into transactions in that state which may be adjudicated upon elsewhere. In the principal case, therefore, the reasons urged seem insufficient to justify the refusal to adopt the conclusion of the lower court of New York. No decisions involving the exact point have been found.

INSURANCE — CO-INSURANCE CLAUSE — APPORTIONMENT OF LOSS. — The plaintiff was insured under several policies, all of which had the usual "apportionment clause" and some the "percentage co-insurance clause." The insurance and the loss were each less than eighty per cent of the value of the property. *Held*, that in estimating the "whole amount of insurance" the face values of all the policies should be added. *Stephenson* v. *Agricultural Ins. Co.*, 93 N. W. Rep. 19 (Wis.). *Farmer's Feed Co.* v. *Scottish Union, etc., Ins. Co.*, 173 N. Y. 241.

The result of these decisions seems unfortunate. Though the insurance on the property exceeded the actual loss, the insured was not completely indemnified. *Cf. Chesbrough* v. *Home Ins. Co.*, 61 Mich. 333. The conclusion of the courts is based solely on the construction of the "apportionment clause" which provided that the "company shall not be liable for a greater proportion of the loss than the amount hereby insured shall bear to the whole insurance effected on the property." If the face value of those policies which contained the "co-insurance clause" is used to estimate the "whole insurance," the result reached cannot well be avoided. But the "co-insurance clause" might well be construed as a condition subsequent which would operate to make the actual amount covered by the policy containing it less than its face value. This smaller sum would then seem to be the true value of the policy in the circumstances of the principal case. See *Armour Packing Co.* v. *Reading Fire Ins. Co*, 67 Mo. App. 215. Only this amount, therefore, should be considered in estimating the whole insurance on the property. By this construction, the insured would receive complete indemnity from the insuring companies. No other authorities have been found.

INSURANCE — CONDITIONS — FAILURE TO GIVE NOTICE WITHIN STIPULATED TIME. — A policy provided that the company should not be liable unless the insured should give notice of an accident within ten days thereafter. The insured was incapacitated by his injuries from giving notice within the time fixed, but did so as soon as he was able. *Held*, that he may recover on the policy. *Comstock* v. *Fraternal Accident Ass'n*, 93 N. W. Rep. 22 (Wis.).

A policy provided that failure to give notice of the accident causing disability or death within fifteen days of the date of the accident should render void all claims under the policy. The insured sustained an injury which he considered trivial but from which he afterwards died. The cause of his death was not known until an autopsy was performed, whereupon notice was given. *Held*, that the beneficiary may recover. *Rorick* v. *Ry. Officials, etc., Ass'n*, 119 Fed. Rep. 63 (C. C. A., Ninth Circ.).

The doctrine has been laid down that conditions in insurance policies to be performed by a beneficiary after the accident or death will be more leniently construed than those to be performed before. See *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389. Since by the express terms of the policy, all conditions are equally conditions precedent, it is hard to justify the distinction. Several courts, however, have applied it in holding that failure to give notice of the accident within the fixed time prescribed will not, under circumstances similar to those in the principal cases, prevent recovery. *Peele* v. *Provident Fund Soc.*, 147 Ind. 543; *Association* v. *Earl*, 16 C. C. A. 596. In other jurisdictions exact performance of the conditions is required. *Gamble* v. *Accident Ass.*

*Co.*, 2 Big. L. & A. Ins. Ca. 681 (Ireland). On strict legal principle only the latter view is tenable. Contrary decisions illustrate the tendency of some American courts to sacrifice principle to the apparent justice of the case.

INSURANCE — LIFE INSURANCE — INSURED EXECUTED FOR MURDER. — The insured was convicted of murder and hanged. The policy contained no express provision as to death resulting from crime. The beneficiaries brought suit on the policy, alleging that the insured had been wrongfully convicted and executed. *Held*, that, even if this allegation is true, there can be no recovery. *Burt* v. *Union, etc., Ins. Co.*, 23 Sup. Ct. Rep. 139.

An express promise to indemnify for the consequences of crime is clearly unenforceable. *Arnold* v. *Clifford*, 2 Sumn. 238 (U. S. Circ. Ct.). It would seem to make no difference that the promise is impliedly included in a wider contract of indemnity. Consequently, where the insured was admittedly guilty of a capital crime a policy was held to be unenforceable. *Amicable Soc.* v. *Bolland*, 4 Bli. N. S. 194. This case, apparently the only one on the exact point, was approved by the Supreme Court when it held a policy invalidated by the suicide of the insured while sane, on the ground that this also was a crime. *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139; see *contra*, *Fitch* v. *American, etc., Co.*, 59 N. Y. 557. The principal case seems to be the first in which the insured was admittedly innocent. To enforce the policy here is merely to enforce an indemnity against death by a miscarriage of justice. Such a contract, however, also seems against public policy, as tending to affect the administration of justice. See LEAKE, CONTR. 3rd ed. 626. A contrary view would open the judgments of criminal courts to collateral investigation.

INSURANCE — WIFE AS BENEFICIARY — SECOND WIFE'S INTEREST. — The insured had taken out a policy for the benefit of his wife and children. It is provided by 45 & 46 Vict., c. 75, § 11, that such a policy "shall create a trust in favor of the objects therein named." The insured's wife subsequently died, and he remarried. The second wife, and children of both marriages survived him. *Held*, that the surviving wife and all surviving children take under the policy. *In re Browne's Policy*, 19 T. L. R. 98 (Eng., Ch. D.).

The question raised is: with what intention did the deceased use the words "wife," and "children"? As to the latter, he must have recognized the possibility of having children in the future, and it is reasonable to suppose that he intended the word to include such of them as should survive him. *Roquemore* v. *Dent*, 33 So. Rep. 178 (Ala.). But in using the word "wife" a married man would naturally intend his present wife, and it is improbable that the possibility of another marriage occurred to the insured at the time he took out his policy. See *Pratt* v. *Matthew*, 22 Beav. 328, 334. The court practically admits this, and seems to construe the word as it considers the testator would have intended it, had he known that he was to have a second wife. Such a method of construction, it is submitted, is not to be supported. No case exactly in point was found, but a legacy "to my beloved wife" was held to lapse with the death of the first wife. *Garrat* v. *Niblock*, 1 R. & M. 629; see *Franks* v. *Brooker*, 27 Beav. 635.

JUDGMENTS — COLLATERAL ATTACK ON JURISDICTION — SURROGATE'S COURT. — In order to confer jurisdiction upon the New York courts, a watch and chain belonging to the intestate, who was domiciled in Connecticut, was brought to New York after his death. Upon this basis the surrogate's court granted administration to the plaintiff, the public administrator. He then commenced the present action against the defendant for causing, in Connecticut, the intestate's death. The defendant attacked the jurisdiction of the court on the ground that the surrogate's decree was obtained by fraudulent practice. *Held*, that the decree was subject to collateral attack on the grounds alleged. *Hoes* v. *N. Y. N. H. & H. R. R.*, 173 N. Y. 435.

By the general rule, with which the New York law is in accord, the judgments of courts of record having probate jurisdiction are entitled to the same presumptions in favor of their assumed jurisdiction as courts of general power. *People* v. *Medart*, 166 Ill. 348. Although the jurisdiction of a foreign court is generally subject to collateral attack, yet by the weight of authority the presumption in favor of the jurisdiction of domestic courts of general powers is conclusive as against collateral attack, unless the lack of jurisdiction appears affirmatively upon the record. *Coit* v. *Haven*, 30 Conn. 190; *Reinhardt* v. *Nealis*, 101 Tenn. 169. But the New York courts have gone far beyond those of the other states in allowing collateral attack on the jurisdiction, since they subject the judgments of a domestic court of general powers to collateral attack even where its jurisdiction appears affirmatively upon the record. *Ferguson* v. *Crawford*, 70 N. Y. 253. So while the case appears to be sound

law in New York on the statutes and authorities cited in the opinion, it is questionable whether it would be generally followed. It is valuable as protecting the New York courts, to a certain extent, from a threatened abuse by which they were subject to the necessity of hearing claims for death arising in any neighboring state.

JUDGMENTS — MISNOMER OF PARTNERSHIP AS CORPORATION — LIABILITY OF PARTNERS. — The plaintiff sued a partnership, describing it as a corporation. Judgment was recovered as against the corporation, the partners having appeared and pleaded to the merits without denying their corporate existence. The plaintiff now sues in equity to charge the individual partners with the judgment. *Held*, that the judgment does not bind them. *Pittsburg Sheet Mfg. Co.* v. *Beale*, 53 Atl. Rep. 540 (Pa.).

The decision seems sound and is of interest in suggesting a very reasonable limitation upon the rule that a misnomer of a defendant in a judgment will not invalidate the judgment when the proper party has been served. See *Guinard* v. *Heysinger*, 15 Ill. 288. The principle underlying this rule is that the party bound by a judgment is the actual person within the contemplation of the court, regardless of his name. *Parry* v. *Woodson*, 33 Mo. 347. Ordinarily, under this rule, individual partners are bound by a judgment against the firm, though the firm is not correctly named. *Bailey* v. *Crittenden*, 44 S. W. Rep. 404 (Tex.). But in the principal case the court intended to bind, not the defendants, but a distinct legal entity, the corporation, and so the case is beyond the reason, and should be without the application of the rule. Nor can the defendants be held on the principle of estoppel, for in admitting their corporate existence, they have denied, not asserted, their individual liability.

LIMITATION OF ACTIONS — TORTS — CONSEQUENTIAL DAMAGE. — The defendant in performing a surgical operation on the plaintiff negligently left a sponge in the wound. Thereafter the statutory period for actions for malpractice had run. During this time the plaintiff consulted the defendant but was not treated by him. *Held*, that the action is not barred by the statute of limitations. *Tucker* v. *Gillette*, 22 Ohio Circ. Ct. Rep. 664. Affirmed by an evenly divided court, *Gillette* v. *Tucker*, 65 N. E. Rep. 865 (Ohio).

The undoubted liability for the original negligence was barred by the statute of limitations, and since no subsequent independent act of negligence could be inferred from the evidence, the defendant's tort was necessarily considered by the affirming judges as a continuing act of negligence. Strictly, however, it was only the injurious consequences which were continuous, and it is almost universally held that the statutory period is not extended by consequential damage if there is an immediate right of action. WOOD, LIMITATIONS, § 178. *Wilcox* v. *Plummer*, 4 Pet. (U. S. Sup. Ct.) 172. The result reached by the court therefore seems difficult to support. Though the plaintiff's ignorance of the defendant's tort will not extend the statutory period, it would seem just to make a special exception where the defendant had the later legal duty of discovering his own negligence. But no authority has been found for such a doctrine. *Cf.* WOOD, LIMITATIONS, § 49.

MORTGAGES — FORECLOSURE BARRED BY STATUTE OF LIMITATIONS — EJECTMENT. — A mortgagee whose debt and right to foreclose were barred by statutes of limitations brought ejectment against the mortgagor's successor. *Held*, that he may recover in ejectment. *Bradfield* v. *Hale*, 65 N. E. Rep. 1008 (Ohio). See NOTES, p. 445.

MUNICIPAL CORPORATIONS — LIMITATION ON POWER TO CREATE INDEBTEDNESS. — A city already indebted up to the constitutional limit, authorized an issue of bonds for the construction of a water works system. The bonds were to be paid by a special annual tax, and were to give no right against the general funds of the city. *Held*, that such bonds would create an indebtedness within the meaning of the constitutional provision. *City of Ottumwa* v. *City Water Supply Co.*, 119 Fed. Rep. 315 (Iowa). See NOTES, p. 442.

PRACTICE — JOINDER OF PARTIES — DECEASED OBLIGOR OF JOINT NOTE. — The plaintiff sued on a joint note, joining as defendants the representative of a deceased obligor and the surviving obligors. § 758 of the New York Code provides that the estate of a person jointly liable on a contract shall not be discharged by his death. *Held*, that the plaintiff may not join the deceased's estate in his action on the note, unless he prove that the survivors are insolvent or have a legal defense. *Potts* v. *Dounce*, 173 N. Y. 335.

The court holds that the effect of the statute is to allow recovery against the deceased's estate at law, but only upon the same proof as was formerly required in equity. *Cf. First Nat. Bank* v. *Leuk*, 123 N. Y. 638. But since, in any case, recovery can be had against the solvent survivors and they having paid can in equity compel contribution from the estate of the deceased, § 758 could well be construed to provide the simple method of settling the whole matter in one action. That practice has been followed in several of the other code states under similar provisions. *Lawrence* v. *Doolan*, 68 Cal. 309; *Hudelson* v. *Armstrong*, 70 Ind. 99. The section in question, however, would seem from its position in the Code to be confined in its application to cases where the party dies pending the action. The result in the principal case might perhaps be sustained on this ground, though this was not mentioned in the decision. *Cf. In re Robinson's Will*, 57 N. Y. Supp. 502.

PROPERTY — EASEMENTS — IMPLIED RESERVATION. — The defendant built a railroad across its own land, with side ditches so constructed as to throw water upon a certain portion of this land. Later the tract was sold to the plaintiff's grantor, the defendant reserving "a right of way" (apparently the fee), but not mentioning the right to flood the adjoining land. *Held*, that there was an implied reservation of this right. *Fremont, etc., R. R. Co.* v. *Gayton*, 93 N. W. Rep. 163 (Neb.).

Where an owner has burdened one part of his land for the benefit of another part, and then sells the burdened part, most jurisdictions refuse to imply a reservation of an easement, though the burden was open and continuous. *Wheeldon* v. *Burrows*, L. R. 12 Ch. D. 31; *Mitchell* v. *Siepel*, 53 Md. 251. The reason given for this, is that the grantor may not derogate from his grant. But this rule should, it would seem, be no more inflexible than the rule that the grantee may not claim rights not expressly included in his conveyance. Yet the courts allow a grantee of the *quasi* dominant part to claim an easement in the grantor's land by implied grant, on the ground that the parties have contracted with reference to the existing condition of the land. *New Ipswich Factory* v. *Batcheldor*, 3 N. H. 190. It would seem that this is equally true, whichever part is sold, and that considerations which permit of implied grants should also permit of implied reservations. A few jurisdictions so hold. *Harwood* v. *Benton*, 32 Vt 722; *Seibert* v. *Levan*, 8 Pa. St. 383. The principal case strengthens the doctrine in the United States.

PROPERTY — EMINENT DOMAIN — LAND ALREADY DEVOTED TO PUBLIC USE. — *Held*, that a city holding its easement over park lands in trust for the public cannot have compensation when the park is taken for a post-office. *In re Certain Land in Lawrence*, 119 Fed. Rep. 453 (Dist. Ct., Mass.). See NOTES, p. 446.

PROPERTY — PRESCRIPTION — DOCTRINE OF LOST GRANT. — The plaintiff for twenty years used a right of way over the defendant's land. The defendant never prevented the use of the way, but often denied the plaintiff's right, and threatened to close up the way. *Held*, that the plaintiff gained no right of way by prescription. *Reed* v. *Garnett*, 43 S. E. Rep. 182 (Va.). See NOTES, p. 438.

SALES — BILL OF LADING — LIABILITY OF INDORSEE FOR DEFAULT OF INDORSER. — Action was brought by the plaintiffs for a breach of warranty of goods shipped to the plaintiffs under a bill of lading attached to a draft which the plaintiffs had paid to the defendant. The indorsements on the draft were sufficient to give the plaintiffs notice that the defendant held it for collection only. *Held*, that the defendant is not liable. *Gregory* v. *Sturgis Nat. Bank*, 71 S. W. Rep. 66 (Tex., Civ. App.).

The case is of interest as tending to limit the doctrine that the indorsee of a bill of lading takes subject to the liabilities of the assignor. See *Landa* v. *Lattin*, 19 Tex. Civ. App. 246. For a discussion of this doctrine see 16 HARV. L. REV. 292.

SALES — CONDITIONAL SALE OF MARE — RIGHT OF SELLER TO OFFSPRING. — The plaintiff was the holder of a recorded conditional bill of sale of a mare. He claimed the mare's colt from the defendant who had purchased the unweaned colt from the conditional vendee. *Held*, that the plaintiff is entitled to the colt. *Anderson* v. *Leverette*, 42 S. E. Rep. 1026 (Ga.). See NOTES, p. 442.

STREET RAILWAYS — FRANCHISE DEPENDENT ON CONSENT OF ABUTTERS — PROCUREMENT BY PURCHASE. — A statute provides that a municipal council shall not grant a franchise for a street railway "until there is produced to the council . . . the written consent of the owners of more than one half of the feet front" of the abutting land. Rev. St. Ohio, § 3439. A railway company purchased such consent from abut-

ters who would otherwise have withheld their consent. *Held*, that the condition imposed by the statute has been complied with. *Hamilton, etc., Traction Co.* v. *Parish*, 65 N. E. Rep. 1011 (Ohio).

The decision is of interest as involving the interpretation of a provision similar to those found in the statutes of other states and in the constitution of New York. See BOOTH, ST. RY. LAW 23; N. Y. Const. Art. III. § 18. It cannot be supposed that the object of these enactments is to compel railway companies to compensate the abutters for damage suffered. Were that so, the statute would doubtless require the consent of all. The real purpose seems twofold. In the first place the municipal authorities are prevented from arbitrarily permitting the public streets to be used for railways. See *Roberts* v. *Easton*, 19 Ohio St. 78, 86. Secondly, the written consent of the majority in interest constitutes a petition to the authorities in whose discretion the granting of the franchise finally rests. If not purchased, this petition is strong evidence that the railway in question would substantially benefit the land owners most nearly affected and hence ordinarily the general public. See *Doane* v. *Chicago City Ry. Co.*, 160 Ill. 22, 32, 37. To allow purchase, on the other hand, plainly permits the abutters to impose unreasonable terms on the railway company. From these considerations it would seem that on principle the decision in the principal case is questionable. It is opposed, also, to the only authority found directly in point. *Doane* v. *Chicago City Ry. Co., supra;* but see S. C. 51 Ill. App. 353. Further, under analogous statutory requirements concerning street improvements the consent of the necessary proportion of abutters cannot be purchased. *Maguire* v. *Smock*, 42 Ind. 1; see *Howard* v. *First Church*, 18 Md. 451, 456.

SURETYSHIP — CO-SURETIES — RIGHTS IN SECURITY HELD BY CO-SURETY. — A sheriff's bond was executed with several sureties. One of these refused to become bound unless security was given for his personal indemnification. Such security was accordingly given. There was no evidence that the other sureties knew of the transaction, but there was no actual fraud. It was claimed that the security must be held for the equal benefit of all the sureties. *Held*, that the surety who obtained it may use it for his own separate indemnity. *McDowell County Com'rs* v. *Nichols et al.*, 42 S. E. Rep. 938 (N. C.). See NOTES, p. 439.

TORTS — LIABILITY FOR NEGLIGENT FAILURE TO PERFORM CONTRACT WITH THIRD PARTY. — The defendants contracted with the lessor of the plaintiff to heat the building in which the plaintiff was a tenant in such a manner that a patent fire sprinkler would not freeze. The defendants negligently failed to do so, the fire sprinkler burst, and the plaintiff suffered damage. *Held*, that the defendants are liable in tort for the negligent failure to perform what they had undertaken. *Pittsfield Cotton-wear Co.* v. *Pittsfield Shoe Co.*, 53 Atl. Rep. 807 (N. H.).

The court recognizes it as well established law that there can be no recovery, by the present plaintiff, on the contract. *Boston, etc., Trust Co.* v. *Salem Water Co.*, 94 Fed. Rep. 238. The case rests on the sole ground that the defendants, having assumed to prevent the accident, are liable for damages resulting from their negligent failure to do so. See *Edwards* v. *Lamb*, 69 N. H. 599. The contract is important only in so far as it shows the existence of an undertaking. The court fails to consider the important question as to whether the defendants were guilty of a misfeasance or of a nonfeasance, assuming apparently that there was a misfeasance. If a mere failure to act according to contract is a misfeasance, there is no meaning left for the word nonfeasance. The great weight of authority has been that there could be no recovery in tort unless there was a misfeasance. *Osborne* v. *Morgan*, 130 Mass 102; *Styles* v. *Long Co.*, 51 Atl. Rep. (N. J., Sup. Ct.) 710. There is a strong and growing tendency, however, to do away with what seems only an arbitrary distinction, and to allow recovery for damage from nonfeasance. *Lough* v. *Davis & Co.*, 70 Pac. Rep. 491 (Wash.); *Mayer* v. *Building Co.*, 104 Ala. 611. It is unfortunate that the principal case, in arriving at a desirable result, does not face the issue squarely. See 16 HARV. L. REV. 133.

TORTS — LIBEL — NEGLIGENT PROTEST OF SATISFIED NOTE. — The defendant, the holder of the plaintiff's note, agreed to send the note to the plaintiff for cancellation, and in consideration received a renewal note. He negligently caused the original note to be protested. *Held*, the plaintiff can recover in tort for the damage to his credit. *State Mut. Life, etc., Assn.* v. *Baldwin*, 43 S. E. Rep. 262 (Ga.).

The case appears unique on its facts since the protest was made negligently. Where an unwarranted protest was intentional, recovery for libel has been allowed. *May* v. *Jones*, 88 Ga. 308. The court in the principal case rested its decision on the ground that a tort is committed by the negligent violation of a contractual duty. *Cf. City, etc., Ry. Co. of Savannah* v. *Brauss*, 70 Ga. 368 But this view is unsupportable on prin-

ciple or authority, and moreover, the reasoning is inapplicable to the facts of the principal case, where the negligent protest of the note and not the violation of the agreement to deliver it for cancellation was the basis of the plaintiff's claim. A possible ground for recovery exists in the theory that liability should be attached to any negligent misstatement which causes damage. See 14 HARV. L. REV. 184. But this theory has not yet been accorded general recognition. The facts, however, though they negative actual malice, show a negligent misstatement which injures the plaintiff's credit, and this according to the better view is a sufficient basis for an action of libel. See *Shepheard* v. *Whitaker*, 32 L. T. 402. See also 15 HARV. L. REV. 757.

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# BOOKS AND PERIODICALS.

LIABILITY OF CONQUERING NATION ON OBLIGATIONS OF CONQUERED. — The responsibility of a conquering nation for the obligations of the vanquished state is ably discussed in a late article. *The Liabilities of a Conqueror*, by H. Erle Richards, 28 L. Mag. and Rev. 129 (Feb., 1903). The author recognizes that there is no generally accepted principle upon which to determine the extent of these liabilities. He argues that two theories founded on analogies from private law are each defective. One, that the conqueror simply takes possession of the conquered country in defiance of all pre-existing claims in much the same manner as a disseisor, he says is inadequate because it leaves out of account the rights of neutral powers; and the other, that the conqueror is a universal successor like an administrator, he rejects because it affords no way of avoiding responsibility on certain obligations which no conqueror can be expected to assume, such as the debt incurred by the conquered state in prosecuting the war resulting in its downfall.

Though the theory that the conqueror's rights and liabilities are merely those of a possessor has distinguished support (3 FILLIMORE, INTERNAT. LAW, §§ 545–555), the author's criticism of it appears just. It does not seem to be doubted that a debt owed by a debtor outside the conquered territory can be recovered. See *U. S.* v. *McRae*, L. R. 8 Eq. 69. Yet this clearly cannot be explained on a theory based on possession only. The objection to the theory of universal succession, that there are some debts which no conqueror will assume, seems equally valid.

Mr. Richards proposes to determine the liabilities to be assumed by an application of the principle that prevails as to the assumption of treaty obligations. A successor is admittedly bound only by treaties having reference to the soil, such, for instance, as those concerning the navigation of rivers or the cession of territory, while treaties in their nature personal, such as treaties of commerce or alliance, are extinguished. Mr. Richards contends that the obligations owed to a neutral subject are as extensive as those owed to a neutral nation, but submits that they cannot in any event be more extensive. According to his view, the determining question would simply be whether a given obligation is attached to or charged on the assets taken over by the conqueror. Two objections to this theory may be offered. The first is that the analogy between a treaty and an obligation owed to a private person is not strong. A treaty is a contract between sovereign states, and affects each of the parties in its relation to the whole family of nations. If one considers the disturbance in political or commercial relations which would follow from attempting to combine the treaties of alliance or commerce of the conquered with those of the conquering nation, it is seen at once why such treaties cannot be assumed. Private obligations, on the other hand, might well be assumed without such a disturbing effect on foreign policy. The second objection is that the proposed test, which requires the obligation to be attached to the assets, would exclude a most important obligation which it is generally supposed ought to be assumed, namely, the gen-